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**IN THE SUPREME COURT FOR THE STATE OF DELAWARE**

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| ORIGIS USA LLC, and<br>GUY VANDERHAEGEN,<br><br>Plaintiffs-Below/Appellants,<br><br>v.<br><br>GREAT AMERICAN INSURANCE COMPANY, AXIS INSURANCE COMPANY, MARKEL AMERICAN INSURANCE COMPANY, BRIDGEWAY INSURANCE COMPANY, RSUI INSURANCE COMPANY, ASCOT SPECIALTY INSURANCE COMPANY, ENDURANCE ASSURANCE COMPANY, BERKSHIRE HATHAWAY SPECIALTY INSURANCE CORPORATION, IRONSHORE INDEMNITY, INC., and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA<br><br>Defendants-Below/Appellees. | No. 461, 2024<br><br>On Appeal from the Superior Court of the State of Delaware<br><br>C.A. No. N23C-07-102 SKR |

# REPLY BRIEF OF APPELLANTS ORIGIS USA LLC AND GUY VANDERHAEGEN

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## INTRODUCTION

Appellant Insureds respectfully reply to the Answering Briefs submitted by the 2021 Insurers (including Great American and Markel American Insurance Company ("Markel")) in Section I below and the 2023 Insurers (including Bridgeway, Certain Excess Insurers, and Markel) in Section II below.

## ARGUMENT

### I. THE 2021 INSURERS FAIL TO SALVAGE THE SUPERIOR COURT'S ERRONEOUSLY EXPANSIVE INTERPRETATION OF THE "NO ACTION" CLAUSE

The Insureds have established that the Superior Court's expansive interpretation of the "No Action" clause in the Great American Policy as precluding their right to seek any relief—including declaratory relief—from the 2021 Insurers until the Underlying Action is fully resolved is erroneously overbroad. Opening Br. at 14-36. As discussed in this Section I below, Great American's Answering Brief—joined by Markel—fails to salvage the Superior Court's erroneous interpretation. In addition, Markel's separate assertion that its motion to dismiss should be affirmed on separate grounds that were not addressed by the Superior Court lack any merit and should be denied.

#### A. Great American Has No Answer for the Plain Policy Language Conflict Inherent in the Superior Court's Expansive Interpretation

As the Insureds have established, the Superior Court's expansive reading of the No Action clause cannot logically or textually be squared with Great American's obligation to advance Defense Costs "***prior to*** … ***final disposition***" of the

Underlying Lawsuit. Opening Br. at 16-20. Simply put, an interpretation of the No Action clause that renders Great American's advancement obligation unenforceable until the Underlying Lawsuit is fully resolved is fundamentally inconsistent with its express obligation to advance Costs ***prior to*** final disposition—thereby effectively reading that language out of the policy. The Superior Court erroneously failed to address this irreconcilable policy language conflict—instead summarily concluding that there was no basis to exempt Great American's advancement obligations from its expansive interpretation. *Id.* at 16.

Shortly thereafter, the Superior Court in *Pangea* expressly declined to follow the Superior Court's reasoning here, noting that it was "struggl[ing] … with squaring the policy language of the duty to defend with this No Action clause" and, as a result, holding that the No Action clause was "***at least ambiguous***" in this regard. *Id*. at 18-20. *Pangea* is consistent with cases nationwide holding that, by virtue of this fundamental policy language conflict, No Action clauses do ***not*** preclude actions by insureds seeking payment of defense costs. *Id*. at 18.

In response, Great American does not even attempt to reconcile this fundamental policy language conflict. Instead, it merely repeats the Superior Court's summary and erroneous conclusion that that the No Action clause unambiguously trumps Great American's express obligation to advance Defense Costs "prior to … final disposition" of the Underlying Lawsuit. Great American

Ans. Br. at 26-31. Great American cannot salvage the Superior Court's erroneous reasoning by merely repeating it.

Likewise, Great American is unable to meaningfully distinguish *Pangea*. The only purported distinction it proffers is that *Pangea* addressed duty to defend language where its Policy here imposes an obligation to advance Defense Costs "prior to … final disposition" of the Underlying Lawsuit. As the Insureds have established, however, Delaware courts hold that, from a timing perspective, both obligations are synonymous because they both incept at the outset of an underlying action. Opening Br. at 19-20. Thus, Great American's only purported basis for distinguishing *Pangea* is a distinction with no difference.

### B. Great American Fails to Refute the Only On-Point Delaware Law

The Insureds have established that *Wright* and *Pangea*—the ***only*** Delaware authorities interpreting the disputed language of the Great American No Action clause—hold that the clause does ***not*** preclude actions by insureds. Opening Br. at 18-20, 25-27. Both cases are fully aligned with the vast majority of cases nationwide holding the same—particularly with respect to declaratory judgment actions. *Id*. at 29-32. In response, Great American is unable to refute the logical soundness of either case—or that they control in this action.

### 1. Great American Has No Meaningful Response to *Wright* or ***Pangea***

The Insureds have established that: (i) *Wright*'s holding that Great American's No Action clause did not preclude its insured's action against it notwithstanding that the underlying action had yet to be resolved has been the guiding precedent in Delaware courts for more than half a century with respect to interpretation of No Action clauses; and (ii) the Superior Court reversibly erred in discounting *Wright*'s logical and precedential weight. Opening Br. at 25-27. In response, Great American merely recites the Superior Court's erroneous downplaying of *Wright* without offering any alternative basis on which its erroneous holding might be salvaged.

In particular, Great American parrots the Superior Court's comment that the language of Great American's No Action clause in *Wright* may not be identical to the language in its No Action clause here. *Id*. As the Insureds have established, however, this argument ignores *Wright*'s express recognition of Great American's No Action clause as "standard" language—plainly implying that it is a boilerplate provision employed by Great American in all of its insurance policies. Moreover, Great American expressly ***conceded*** at oral argument that the two clauses are "***likely to be similar***." Opening Br. at 26-27. At the very least, these factors warranted an inference that the language was substantially similar—which the Superior Court was required, but failed, to draw in favor of the Insureds as the non-moving parties. *Id*. Great American conspicuously proffers no substantive response to these arguments.

Great American also attempts to distinguish *Wright*. First, it argues that *Wright* involved a property damage liability insurance whereas this action involves D&O liability insurance. Yet it does not even attempt to explain—nor could it—how the particular risk covered by a policy has any potential bearing on when an insured is entitled to bring legal action against its insurer for contractual non-performance. Second, Great American argues that *Wright* was positioned differently than this case procedurally—*i.e.*, *Wright* was a third-party action and this is a first-party action. But again, whether the insured sues it insurer as a third-party defendant or directly has no logical bearing on whether the No Action clause can be interpreted to preclude the insured's lawsuit prior to resolution of the underlying lawsuit.

Likewise, with respect to *Pangea*, the only purported distinction Great American can muster is that its policy in *Pangea* contained duty to defend language where its policy in this action contains duty to advance Defense Costs "prior to … final disposition" of the Underlying Lawsuit language. As discussed in Section I.A. above, however, this is a distinction with no difference under Delaware law.

**2. *Rodriguez* Has No Rational Application Here**

Great American's No Action clause has two components. Component 1—*i.e.*, full compliance with the terms of the policy—has never been at issue in this action, and Great American does not assert otherwise. Rather, Great American asserts that ***Component 2***—*i.e.*, final determination of the insured's obligation to pay—precludes this action. Nevertheless, Great American asserts that this Court's

interpretation of Component 1 in *Rodriguez*—rather than *Wright* and *Pangea*'s interpretations of Component 2—controls in this action. Great American Ans. Br. at 19, 31-32. In other words, Great American argues that *Rodriguez*'s interpretation of language that it does not even assert applies in this action trumps *Wright* and *Pangea*'s interpretations of the language that it asserts precludes this action. This argument is absurd on its face.

Recognizing its utter futility, Great American cites the Superior's Court's comment that "*Rodriguez* at least indicates that there is no inherent presumption in Delaware law that an insured is at all times guaranteed the right sue its insurer." *Id*. at 19. However, this argument critically overlooks the Delaware Declaratory Judgment Act. As the Insureds have established, the stated purpose of the DJA is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" arising from contracts—including before a breach occurs. Opening Br. at 27-29. These purposes are particularly applicable to declaratory judgment actions seeking interpretation of insurance policies. *Id*. at 27-28. Courts across the country have reached precisely this same conclusion with respect to other states' declaratory judgment statutes. *Id.* at 28.

While the DJA and its supporting caselaw may not literally "guaranty" an insured's right to an early declaratory adjudication of its insurer's contractual obligations, they make clear that Delaware law and public policy strongly favor that right. Notably, Great American has no substantive response to any of the Insureds'

DJA-related arguments, including that the Superior Court's expansive interpretation of the No Action clause directly contradicts the DJA's stated intent.

### C. The Non-Delaware Cases Cited by Great American Represent the Extreme Minority Position and Conflict with Delaware Law

As the Insureds have established, the overwhelming majority of courts and commentators nationwide agree that No Action clauses are intended to preclude direct actions by injured parties against their tortfeasor's insurer prior to a final determination of the insured's liability to the injured party. Opening Br. at 29-32. Conversely, these authorities make abundantly clear that No Action clauses are ***not*** intended to, and should ***not*** be interpreted as, precluding actions by insureds—particularly declaratory judgment actions. *Id*. This limitation on the interpretation of No Action clauses has become so widely accepted that leading insurance treatises treat it as settled law. *Id*. at 30. In summarily concluding that Delaware would not follow the overwhelming weight of authority nationally, the Superior Court erred in failing to address the reasoning of these cases. *Id*.

In response, Great American attempts to distinguish the overwhelming majority position by repeating its prior argument (as to *Pangea*) that the Insureds' cases all involve duty to defend policies whereas its Policy here involves a duty to advance Defense Costs "prior to … final disposition" of the Underlying Lawsuit. This argument necessarily fails. First, its factual premise is demonstrably incorrect. In fact, several of the cases cited by the Insureds addressed duty to advance policy

language. Opening Br. at 18. Second, Great American's purported policy language distinction is meaningless under Delaware law in any event. As discussed in Section I.A. above, Delaware views the duty to defend and the duty to advance defense costs as effectively synonymous because both obligate the insurer to pay defense costs from the outset of an action against its insured.

Unable to meaningfully distinguish the Insureds' cases, Great American cites a small handful of non-Delaware cases that have not adhered to the overwhelming majority view. Great American Ans. Br. at 17-18 & n.7. Great American does not dispute—nor could it—that these cases represent the extreme minority position. Moreover, they are mostly conclusory in nature and lack any meaningful analysis of the No Action clause language at issue. For example, *Sacred Heart Health Services* contains ***no*** substantive discussion of the No Action clause at issue. Likewise, *Haxton*—an unpublished, *per curiam* decision relied upon extensively by Great American—likely would have reached the opposite conclusion under the facts of this case. Specifically, *Haxton* held that, because the insurer at issue had not denied coverage, it was distinguishable from the cases adopting the majority view. As discussed in Section I.D. below, however: (i) the Insureds plainly allege in their Complaint that Great American has denied coverage; and (ii) Great American indisputably ***has*** denied coverage in this case—at the very least as to indemnification. Moreover, because these non-Delaware cases are contrary to

*Wright* and *Pangea*—the ***only*** on-point Delaware cases—they are inconsistent with Delaware law regardless.

### D. Great American's Assertion That It Has Not Denied Coverage Is a Red Herring, and Is Not True in Any Event

Citing *Haxton*, Great American appears to assert that courts limit application of No Action clauses ***only*** where the insurer has denied its coverage obligations. Great American Ans. Br. at 19-24. It then fallaciously suggests that the Superior Court properly interpreted its No Action Clause here because it has not denied any of its coverage obligations to the Insureds. *Id*. Great American is wrong on both the law and the facts.

Neither *Haxton* nor any of Great American's other cases articulates any such rule, and Great American does not even attempt to explain ***why*** an insurer's denial of coverage (or lack thereof) is—or should be—a relevant consideration in interpreting the language of No Action clauses. Moreover, whether or not the insurer at issue denied coverage is not a determinative factor in the overwhelming majority position cases cited by the Insureds. To the contrary, most of these cases were decided on policy language interpretive factors entirely unrelated to denial of coverage—including, *inter alia*, (i) the intent of No Action clauses to preclude only actions by injured third parties (as opposed to actions by insureds), (ii) policy language conflicts between No Action clauses and an insurer's obligation to defend/advance defense costs, and (iii) inconsistency with state declaratory

judgment statutes. *See* Opening Br. at 15, 29-32. In any event, neither *Haxton* nor any of the other cases Great American cites even arguably represent Delaware law. Conversely, in *Wright* and *Pangea*—the only on-point Delaware cases—denial of coverage was not even remotely a consideration.

Moreover, whether Great American has actually denied any of its coverage obligations—including its obligation to advance Defense Costs—is entirely ***irrelevant for purposes of its motion to dismiss***. As the Insureds have established, Delaware courts adjudicating motions to dismiss must accept all of a plaintiff's well-pled factual allegations as true. *Id.* at 13. "Well pled" means merely "that the complaint puts a party on notice of the claim being brought." *Watson v. Tjaden*, 2015 Del. Super. LEXIS 197, at *3 (Apr. 10, 2015). In their Complaint, the Insureds plainly allege that Great American has denied its obligation to indemnify any settlements or judgments arising from the Underlying Lawsuit. (A00077-79, ¶¶ 39-40, 43). Likewise, the Insureds plainly allege that Great American's proposal to advance a mere 10% of their Defense Costs was so inadequate that it was both "arbitrary and wrongful" (A00078-79, ¶ 41) and therefore a breach of its advancement obligations (A00081, ¶¶ 54-55). The Superior Court did not opine as to the sufficiency of these allegations—indeed, it improperly ignored them. Accordingly, Great American's assertion that it has not, in fact, effectively denied its Defense Cost advancement obligation is irrelevant. On a motion to dismiss, the Insureds' well-pled ***allegations*** of denial of coverage are ***fully determinative***, and

Great American's assertion of contrary factual allegations does not change that mandatory result.

Relatedly, the Insureds established in their Motion for Clarification that their allegations that Great American has breached its duty to advance Defense Costs—which the Superior Court was required to accept as true—precluded dismissal of this action because, if proven at trial, such breaches would negate the 2021 Insurers' right to enforce the Great American Policy's conditions of coverage, including the No Action clause. (A01330-31) The Superior Court reversibly erred in simply ignoring this independent basis upon which dismissal of Great American was improper. Opening Br. at 22-23. Great American conspicuously proffers no substantive response to this argument.

Finally, even if whether or not Great American actually denied coverage was somehow relevant on a motion to dismiss (which it plainly is not), Great American ***did***, in fact, deny coverage. Indeed, Great American does not dispute—nor could it—***that it fully denied coverage for indemnity*** of any settlements or judgments that may arise from the Underlying Lawsuit. (A00614) ("Great American does not believe coverage is available under Policy for the Lawsuit"). Likewise, Great American's proposal to advance only 10% of the Insureds' Defense Costs was so absurdly disproportional to its actual advancement obligation that it could not have been made in good faith. (A00078-79, ¶ 41; A00081, ¶¶ 54-55; A00975-76; A01330-31). As such, it effectively was a denial of coverage.

Great American's only response is a red herring assertion that it has unfettered discretion under its "Allocation" provision to advance as much (or as little) of the Insureds' Defense Costs as it unilaterally sees fit. Great American Ans. Br. at 20-24. Great American conveniently omits, however, that its Allocation provision implies, at the very least, an obligation to seek a "negotiated" resolution with the Insureds in that regard (A00107, at Section V.A.(2)). Great American never undertook any such effort—indeed, it sued the Insureds in Florida federal court before even providing them with its position on allocation of Defense Costs.[1] Opening Br. at 11 n.3.

Delaware courts aptly recognize the abusive potential of insurers having unilateral discretion to determine allocation of defense costs—particularly where there has been no attempt to reach a negotiated resolution with their insureds. For example, in *Clover Health Invs. v. Berkley Ins. Co.*, 2023 Del. Super. LEXIS 278, at *31-33 (Feb. 6. 2023), policy language bestowing an insurer with "sole discretion to determine [allocation of] defense costs" was held to be "potentially contradictory"

[1] Great American oddly asserts that, given the Insureds' objections to the Superior Court's expansive interpretation of the No Action clause, they are free to litigate their coverage issues "tomorrow" in the Florida federal court in which it first surreptitiously sued them, and that the Florida federal court "is fully capable of deciding the coverage issues." Great American Ans. Br. at 30-31. This assertion is beyond misleading. As a litigant in that action, Great American is fully aware that the Florida federal court dismissed the Florida action on abstention grounds, and that its dismissal order is now final and non-appealable. (A00960-61 & n.7). Thus, there is no Florida federal court action—and has not been for a long time.

with language requiring that it seek agreement in that regard with its insured—which never occurred. As a result, the allocation language was held to be ambiguous and the insured was entitled to complete recovery of its defense costs under the "Larger Settlement Rule." *Id*. At the very least, *Clover Health* renders dubious Great American's refusal to admit that it has effectively denied its obligation to advance Defense Costs—particularly where it made no effort to negotiate an appropriate allocation with the Insureds.

### E. Great American Has No Answer to the Insureds' Public Policy Arguments

The Insureds have established that the Superior Court's expansive interpretation of Great American's No Action clause undermines Delaware's strong public policy interests: (i) in having D&O coverage disputes involving Delaware insureds adjudicated in Delaware courts under Delaware law; and (ii) favoring settlements. Opening Br. at 32-36. Moreover, it has far-reaching implications for the ability of all Delaware insureds to obtain expeditious adjudication of their D&O policy rights in Delaware. *Id*. Tellingly, Great American is unable to muster any response.

### F. Great American's Waiver Arguments Are Meritless and Do Not Apply to this Appeal in Any Event

Delaware Supreme Court Rule 8 states that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question

not so presented." The "question" raised by Great American in its motion to dismiss—and now presented on appeal—is whether its No Action clause can be interpreted to preclude this action, including its claims for declaratory judgment, prior to resolution of the Underlying Lawsuit. Opening Br. at 13. The Insureds addressed this question at length in their Consolidated Opposition to the Defendant Insurers' Motions to Dismiss ("Opposition"), their Motion for Clarification, and the oral arguments associated with those motions. (A00969-86; A01261-74; A01325-31; Opening Br., Exh. B, at 4-13, 16-20) Thus, it is not reasonably disputable that interpretation of Great American's No Action clause is the "question" properly before this Court.

Yet Great American asserts that several arguments the Insureds advance in this appeal regarding interpretation of the No Action clause have been waived because they did not discuss them specifically in their Opposition. Great American Ans. Br. at 24-26, 38-42. These arguments include that:

- The language of Great American's No Action clause conflicts with its Defense Costs advancement language (the "Conflict Issue") and, as a result, the language of the No Action clause is ambiguous (the "Ambiguity Issue");
- Because Great American's No Action clause is a condition of coverage, it was not a valid basis for its Motion to Dismiss in light of the Insureds' allegations of breach in their Complaint—which, if proven at trial, would render the No Action condition unenforceable (the "Unenforceability Issue); and

- The Superior Court's expansive interpretation of the No Action clause is inconsistent with Delaware's Declaratory Judgment Act and reasonable expectations of the insured doctrine.

*Id*. Great American is wrong for numerous reasons.

First, this Court has long rejected such arguments. For instance, in *Kerbs v. California Eastern Airways, Inc*., this Court held that:

> We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an ***entirely new theory of his case***, but when the argument is ***merely an additional reason in support of a proposition urged below***, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered.

90 A.2d 652, 659 (Del. 1952) (emphasis added); *see also Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964) (same).

The Insureds' "theory of the case" consistently reflected in all of its Superior Court briefing and oral arguments is that the No Action clause cannot properly be interpreted to preclude this action prior to resolution of the Underlying Lawsuit. *Kerbs* and its progeny make clear that, whatever "additional reasons" the Insureds might advance in this Court in support of their theory of the case—whether or not specifically discussed in their Opposition—are fair game in this appeal. This long-established principle applies to all of the "additional reasons" supporting the Insureds' proffered interpretation of the No Action clause that Great American contends have been waived.

Second, Rule 8's "when the interests of justice so require" proviso also applies here. *See, e.g.*, *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 679 (Del. 2012) (notwithstanding that litigant did not raise specific argument in Chancery Court, interests of justice mandated that it should be heard on appeal because it was "outcome-determinative" and likely to have "significant implications for future cases"). Interpretation of the No Action clause obviously is outcome-determinative with respect to the 2021 Insurers in this action. Likewise, interpretation of the No Action clause is an issue of first impression for this Court that is likely to have significant implications for future cases involving other Delaware insureds. *See* Opening Br. at 32-36. As such, the "interests of justice" further require that these arguments be considered in this appeal.

Third, the Insureds did, in fact, raise the Conflict Issue and related Ambiguity Issue, as well as the Unenforceability Issue, in the Superior Court. As such, they are properly preserved for appeal—even in the absence of the "additional argument" doctrine and "interests of justice" proviso to Rule 8. Specifically, the Insureds' Opposition cited numerous cases discussing the Conflict Issue and Ambiguity Issue in detail. *See* Opening Br. at 18. Accordingly, the 2021 Insurers had ample notice of both arguments regardless of whether the Insureds specifically discussed every aspect of those cases in their Opposition. Likewise, the Conflict and Ambiguity Issues were: (i) a substantial focus of the oral argument on Great American's Motion

to Dismiss; and (ii) the ***sole*** focus (along with the Unenforceability Issue) of the Insureds' ensuing Motion for Clarification and oral argument on that motion. *Id*. at 23-24. Great American responded to the Insureds' arguments on these issues and the Superior Court ruled on them—albeit erroneously—on their merits. *Id*., Ex. B. Finally, because *Pangea*—which declined to follow the Superior Court's rulings on the Conflict and Ambiguity Issues in this action—was not decided until ***after*** the Superior Court's rulings at issue in this appeal, it was literally impossible for the Insureds' to have raised their *Pangea*-based arguments on those issues prior to this appeal. Thus, there is no legitimate basis for Great American to dispute that the various issues it asserts were waived are, in fact, fully preserved for appeal and properly before this Court. *See* Opening Br. at 23-24.

### G. Markel Seeks Review of Issues Not Properly Before This Court

In addition to joining in Great American's Answering Brief, Markel separately asserts that this Court should adjudicate certain affirmative defenses presented in its Motion to Dismiss (including ripeness, standing, and alleged misrepresentations) that the Superior Court indisputably did not decide. Markel Ans. Br. at 17-32. To be clear, these are ***not*** "additional reasons" supporting its arguments with respect to the issues the Superior Court ***did*** decide, but rather just a reiteration of defenses presented in its Motion to Dismiss that the Superior Court opted not to address. In support of its assertion, Markel generically invokes Rule 8's "interests of justice" proviso. Yet it fails to proffer any explanation—nor could

it—why the "interests of justice" require this Court to adjudicate issues that the Superior Court can decide on remand if its No Action clause rulings ultimately are reversed (as they should be).

This Court consistently has held that adjudicating issues not ruled upon in the lower courts would constitute an improper—or at least premature—use of the appellate process. *See, e.g.*, *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 247 A.3d 229, 250 (Del. 2021) ("The trial court did not address this point, and we think it would be unwise for us to do so in the first instance and on a purely advisory basis."); *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("It is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court."). Accordingly, this Court should decline Markel's invitation to issue an advisory opinion here. However, in the unlikely event that this Court does consider Markel's separate—and wholly meritless—arguments for dismissal, it should deny them for the reasons set forth in the Insureds' Opposition.

## II. THE 2023 INSURERS HAVE NO ANSWER TO THE SUPERIOR COURT'S ERRONEOUS FAILURE TO RECOGNIZE THE INFORMATION BREACH CLAIM AS A DISTINCT "CLAIM" UNRELATED TO PRE-CUT-OFF DATE WRONGFUL ACTS

The Insureds have established that multiple distinct "Claims" can—and often do—arise from the same lawsuit. Opening Br. at 40 (citing *AT&T Corp. v. Faraday Cap. Ltd.*, 918 A.2d 1104 (Del. 2007) ("*Farraday*")). Such Claims are related for purposes of Prior Acts Exclusions only if they share "a ***meaningful*** link that connects the factual circumstances underpinning the alleged Wrongful Acts" in each set of Claims. *Id*. at 44. This in turn requires that one set of Wrongful Acts be "***the basis***" of the other. *Id*. As this Court recently held, the determinative factor in this regard is whether the Claims at issue "involve ***the same underlying wrongful conduct***." *In re Alexion Pharms. Inc. Ins. Appeals,* 2025 Del. LEXIS 52, at *18-19 (Feb. 4, 2025) (emphasis added).

The Information Breach Claim solely alleges post-Cut-Off Date breaches of the SRA—years after it was executed—allegedly for failing to produce information required by the SRA. Opening Br. at 39. The alleged pre-Cut-Off Date Wrongful Acts, on the other hand, are focused almost entirely on alleged misrepresentations and fraud years earlier in inducing the Investors to enter into the SRA. *Id*. These Claims, on their face, do not "involve the same underlying wrongful conduct." The handful of arguments proffered by the 2023 Insurers in response do not even remotely alter that inescapable and determinative fact.

### A. Bridgeway's Answering Brief

First, Bridgeway fixates on a single sentence in the Information Breach Claim asserting that "[b]ut for [the breaches alleged in therein], Plaintiffs would be able to set forth ***their claims*** with even more particularity." Bridgeway Ans. Br. at 12-14. (emphasis added). Bridgeway asserts that this single reference to the Investors' claims arising from pre-Cut-Off Date Wrongful Acts establishes relatedness. Not so. The mere fact that the Insureds' alleged failure to provide information required by the SRA may have rendered the pre-Cut-Off Date Wrongful Acts more challenging to plead plainly does not equate to the wrongful conduct alleged in both Claims being the same or the former wrongful conduct being based on the latter.

Second, Bridgeway incorrectly asserts that the Information Breach Claim cannot be a distinct Claim because the Underlying Lawsuit as a whole "is actually for" pre-Cut-Off Date Wrongful Acts. Bridgeway Ans. Br. at 14-16. In so asserting, Bridgeway conveniently ignores this Court's holding in *Faraday* (*see* Opening Br. at 40)—that a single lawsuit may contain multiple Claims. Indeed, in quoting the language of its policy's insuring agreement, Bridgeway proves the futility of its argument by misleadingly replacing the word "Claim" with the words "suit" and "lawsuit." *Id*. at 15. Bridgeway's Policy covers as many different Claims as the Underlying Lawsuit alleges, and it is not entitled to edit that coverage out of its Policy after the fact.

Third, Bridgeway disputes the Insured's argument that, in deciding its Motion to Dismiss, the Superior Court was required to draw all reasonable inferences from the Information Breach Claim in their favor—which it plainly failed to do. Rather, Bridgeway asserts that this long-established requirement applies only to the Insureds' Complaint in this action and not the UAC—relying exclusively on *Century Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531 (Del. 2011). Bridgeway is wrong. Consistent with courts throughout the country, *Century* plainly does ***not*** limit this requirement to the plaintiff's complaint. *Id*. at 536; *see also Amica Mut. Ins. Co. v. Rice*, 2024 U.S. Dist. LEXIS 79155, at *15 (D. Mass. Mar. 21, 2024) (drawing all reasonable inferences in non-moving party's favor from allegations in the ***underlying*** complaint); *Water Well Sols. Serv. Grp. Inc. v. Consol. Ins. Co*., 881 N.W.2d 285, 291 (Wis. 2016) ("[C]ourt must liberally construe the allegations contained in the ***underlying*** complaint" (emphasis added)). Moreover, *Century*'s related standard that a motion to dismiss must be denied "unless the plaintiff could not recover under any reasonably ***conceivable*** set of circumstances" effectively would be neutered if it was limited solely to allegations in the plaintiff's complaint. *See* 27 A.3d at 536 (emphasis added).

**B. Certain Excess Insurers' Answering Brief**

Component 1 of the Bridgeway Policy's definition of "Claim" is a "[w]ritten demand … for monetary [or] non-monetary … relief[.]" (A00276) The Insureds have established that the Information Breach Claim is a distinct "Claim" as defined

Component 1. Opening Br. at 38-41. Yet Certain Excess Insurers incorrectly counter that it is not a distinct Claim because it does not, standing alone, ***also*** satisfy component 2—*i.e.*, a "[c]ivil proceeding commenced by the service of a complaint or similar proceeding." Certain Excess Insurers Ans. Br. at 20-21. This argument plainly fails because the various components of the definition of "Claim" are, on their face, separated by a ***disjunctive "or."*** (A00276, Section VI, definition of "Claim") Moreover, in *Faraday*, this Court effectively rejected the same argument Certain Excess Insurers assert here in holding that a single lawsuit may contain multiple "Claims." Certain Excess Insurers' attempt to distinguish *Faraday* on its facts (*id*. at 21) is both incomprehensible and irrelevant to its reasoning.

In addition, Certain Excess Insurers incorrectly rely on *Seritage Growth Holdings* to assert that the pre-Cut-Off Date Wrongful Acts alleged in the UAC are meaningfully linked with the Information Breach Claim merely because they involve a common transaction—the SRA. *Id*. 25-28. But Delaware courts have been clear that merely sharing some background facts—including a common transaction—is ***not*** a ***meaningful*** linkage. *See* Opening Br. at 44. Moreover, the relatedness holding in *Seritage* turned on far more than a common transaction—it involved the same alleged wrongful conduct. 2022 Del. Super. LEXIS 1453, at *25. But here, the wrongful conduct alleged in the Pre-Cut-Off Date Claim is not even remotely the same—and occurred years apart from—the wrongful conduct alleged in the Information Breach Claim. Thus, under *In re Alexion* and other Delaware cases cited

the Insureds, the Claims are not related, notwithstanding certain other similarities. *See* Opening Br. at 44-45.

Finally, Certain Excess Insurers falsely assert that the Insureds do not dispute the Superior Court's erroneous conclusion that "[t]he Underlying Litigation does not seek any relief" arising from the Information Breach Claim. Certain Excess Insurers' Ans. Br. at 28-29. In fact, the Insureds have plainly established that: (i) this conclusion is incorrect in light of the UAC's broadly-pled Prayer for Relief; and (ii) the Superior Court erred in failing to infer, as was required, that the allegations in the Information Breach Claim were intended to support some form of relief (and instead inferred precisely the opposite). Opening Br. at 40-41.

## CONCLUSION

For the reasons set forth in the Insureds' Opening Brief and herein, this Court should reverse the Superior Court's dismissal of this action as to both the 2021 Insurers and the 2023 Insurers and remand this matter for further proceedings on the merits.

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Respectfully submitted,

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